Excel Champ Automobile Sdn Bhd v Bermaz Motor Trading Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCVC-467–04 OF 2018
WONG KIAN KHEONG J
29 MARCH 2019

Civil Procedure — Interpleader proceedings — Interpleader summons — Dealership agreement for sale of Mazda cars between plaintiff and first defendant — Second defendant financed sale by way of facility — Repayment secured by debenture which provided for floating charges to be created over assets of plaintiff — Plaintiff breached dealership agreement and defaulted on facility — Whether first defendant or bank was entitled to Mazda cars — Whether court should exercise its discretion under O 17 r 8 of the Rules of Court 2012 — Rules of Court 2012 O 17 r 8

The first defendant distributed Mazda cars and had entered into a vehicles sales dealer agreement ('the dealership agreement') with the plaintiff which, among others, allowed the plaintiff to sell Mazda cars. The second defendant was a licensed bank ('the bank') which had provided a floor stocking facility to the plaintiff ('the facility'). The repayment of the facilities by the plaintiff was secured by two debentures created by the plaintiff in favour of the bank ('the debentures'). The debentures provided for, among others, floating charges to be created over all assets of the plaintiff ('the floating charges'). All the cars had been purchased by the plaintiff from the first defendant with funds from the facility but the first defendant had not been paid by the plaintiff for the cars. The bank's officer visited the showroom and found that none of the cars were at the showroom. The bank then wrote a letter to the plaintiff but the plaintiff did not reply. Consequently, the bank lodged a police report because the cars had been removed from the showroom without the bank's consent. This originating summons ('the OS') was an interpleader filed by the plaintiff and raised the following questions: (a) whether the first defendant or the bank was entitled to the Mazda cars ('the cars'); and (b) whether the court should exercise its discretion under O 17 r 8 of the Rules of Court 2012 ('the RC') to deprive the plaintiff of costs of this interpleader and order the plaintiff to pay costs of the OS to both the first defendant and the bank.

Held:

(1) The dealership agreement was a commercial contract and should be interpreted in a commercially sensible manner. The dealership agreement did not provide, either expressly or by necessary implication, that the first

defendant shall retain property in the cars until and unless the first defendant was paid in full for the cars by the plaintiff. As the three conditions stipulated in s 20 of the Sale of Goods Act 1957 ('the SGA') had been fulfilled in this case, 'property' in the cars would pass to the plaintiff 'when the contract is made'. Hence, the property in the cars had passed from the first defendant to the plaintiff by virtue of ss 19(3) and 20 of the SGA (see paras 23–25).

(2) The cars would fall within the wide definition of 'charged assets' in the debentures. The cars were acquired by the plaintiff after the execution and registration of the floating charges with the ROC. Nonetheless, the cars would form part of the charged assets which 'hereafter' belonged to the plaintiff under section 5.01 of the debentures. Furthermore, the floating charges were a 'continuing security' pursuant to section 5.05 of the debentures and would include the cars which had been purchased by the plaintiff after the execution and registration of the floating charges with the RC. As the cars fell within the wide purview of the floating charges, the bank was entitled to the cars (see paras 33–34).

(3) As the bank was not a party to the dealership agreement, based on the doctrine of privity of contract, the bank was not bound by the dealership agreement (see para 35).

(4) Despite the fact that this interpleader was rightly commenced by the plaintiff, the court exercised its discretion under O 17 r 8 of the RC to order the plaintiff to pay costs of this OS to both the first defendant and the bank. This exercise of discretion was based on the following exceptional circumstances: (a) the plaintiff had breached the dealership agreement by not paying the first defendant for the sale of the cars; (b) the plaintiff had not only defaulted on the facility but had also removed the cars from the showroom without the bank's consent; (c) the first defendant and the bank were blameless in this case; and (d) the plaintiff's breaches had caused loss to the first defendant and the bank (see para 39).

[Bahasa Malaysia summary

Defendan pertama mengedarkan kereta Mazda dan telah memasuki perjanjian pengedaran jualan kenderaan ('perjanjian pengedaran') dengan plaintif yang, antara lain, membenarkan plaintif menjual kereta Mazda. Defendan kedua adalah bank berlesen ('bank') yang telah menyediakan kemudahan perancangan lantai kepada plaintif ('kemudahan'). Pembayaran balik kemudahan oleh plaintif telah dijamin oleh dua debentur yang dibuat oleh plaintif yang memihak kepada bank ('debentur'). Debentur yang disediakan, antara lain, gadaian terapung akan dibuat atas semua aset plaintif ('gadaian terapung'). Semua kereta telah dibeli oleh plaintif daripada defendan pertama dengan dana daripada kemudahan itu tetapi defendan pertama tidak dibayar oleh plaintif untuk kereta. Pegawai bank melawat bilik pameran dan

A mendapati tiada kereta di bilik pameran. Bank kemudian menulis surat kepada plaintif tetapi plaintif tidak memberi jawapan. Akibatnya, bank itu membuat laporan polis kerana kereta itu telah dikeluarkan dari bilik pameran tanpa persetujuan bank. Saman pemula ini ('OS') adalah satu interplider yang difailkan oleh plaintif dan menimbulkan soalan-soalan berikut: (a) sama ada B defendan pertama atau bank berhak kepada kereta Mazda ('kereta'); dan (b) sama ada mahkamah harus menjalankan budi bicaranya di bawah A 17 k 8 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk menghalang plaintif kos interplider ini dan memerintahkan plaintif membayar kos OS kepada kedua-dua defendan pertama dan bank.

C

Diputuskan:

(1) Perjanjian pengedaran adalah kontrak komersial dan harus ditafsirkan secara komersial secara wajar. Perjanjian pengedaran tidak memberi, D sama ada secara nyata atau dengan maksud, bahawa defendan pertama akan mengekalkan harta dalam kereta sehingga dan kecuali defendan pertama dibayar penuh untuk kereta oleh plaintif. Memandangkan ketiga-tiga syarat yang termaktub dalam s 20 Akta Jualan Barangan 1957 ('Akta') telah dipenuhi dalam kes ini, 'harta' dalam kereta akan E diserahkan kepada plaintif 'apabila kontrak dibuat'. Oleh itu, harta dalam kereta telah dilepaskan daripada defendan pertama kepada plaintif berdasarkan ss 19(3) dan 20 Akta (lihat perenggan 23–25).

(2) Kereta akan jatuh dalam definisi yang luas 'aset gadaian' dalam debentur. Kereta itu diambil oleh plaintif selepas pelaksanaan dan pendaftaran F gadaian terapung dengan KKM. Walau bagaimanapun, kereta akan menjadi sebahagian daripada aset gadaian yang 'kemudiannya' dimiliki oleh plaintif di bawah seksyen 5.01 debentur. Tambahan pula, gadaian terapung adalah 'jaminan berterusan' berdasarkan seksyen 5.05 debentur dan termasuk kereta yang telah dibeli oleh plaintif selepas pelaksanaan G dan pendaftaran gadaian terapung dengan ROC. Memandangkan kereta-kereta itu jatuh dalam jangkauan luas gadaian terapung, bank itu berhak kepada kereta (lihat perenggan 33–34).

(3) Oleh kerana bank itu bukan pihak kepada perjanjian pengedaran, H berdasarkan doktrin priviti kontrak, bank tidak terikat dengan perjanjian pengedaran (lihat perenggan 35).

(4) Walaupun hakikatnya interplider ini dimulakan dengan betul oleh plaintif, mahkamah melaksanakan budi bicaranya di bawah A 17 k 8 KKM untuk memerintahkan plaintif membayar kos OS ini kepada I kedua defendan pertama dan bank. Penentuan budi bicara ini adalah berdasarkan keadaan luar biasa berikut: (a) plaintif telah melanggar perjanjian pengedaran dengan tidak membayar defendan pertama untuk penjualan kereta; (b) plaintif bukan sahaja gagal dalam kemudahan itu tetapi juga telah mengeluarkan kereta dari bilik pameran tanpa

persetujuan bank; (c) defendan pertama dan bank tidak bersalah dalam kes ini; dan (d) pelanggaran plaintif telah menyebabkan kerugian kepada defendan pertama dan bank (lihat perenggan 39).]

Cases referred to

AIMB Marketing Sdn Bhd & Ors v Malaysian Trustees Bhd & Ors [2011] 5 MLJ 210, CA (refd)
Au Yong Kun Min v Tractors Malaysia Bhd [1997] 5 MLJ 168; [1997] 5 CLJ 31, HC (refd)
BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors [2000] 2 MLJ 70, CA (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
CIMB Bank Bhd v ZAQ Construction Sdn Bhd [2013] 1 LNS 230, HC (refd)
Illingworth v Houldsworth & Anor [1904] AC 355, HL (refd)
Interdeals Automation (M) Sdn Bhd v Hong Hong Documents Sdn Bhd [2015] 3 MLJcon 213; [2009] 2 CLJ 321, CA (refd)
Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)
Malaysian International Merchant Bankers Bhd v Highland Chocolate and Confectionary Sdn Bhd & Anor (No 2) [1998] 4 CLJ Supp 32 (refd)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585; [2005] 2 CLJ 596, CA (refd)
NGV Tech Sdn Bhd (receiver and manager appointed) (in liquidation) v Ramsstech Ltd [2015] MLJU 671, HC (refd)
Peter Yip Shou Shan v George Kent (M) Bhd & Ors [2002] 2 MLJ 146; [2002] 2 CLJ 205, HC (refd)
Tan See King & Anor v Anata Knitting Industry (M) Sdn Bhd [2013] 2 MLJ 284, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 108(1)
Companies Act 2016
Rules of Court 2012 O 17 r 8
Sale of Goods Act 1957 ss 2, 19, 19(1), (3), 20

Tan Yen Ning (Foo Hiap Siong & Co) for the plaintiff.
Vasanthi Sathasivam (Subathra KS Nathan with her) (K Sugu & Assoc) for the first defendant.
Wan Azhab bin Wan Din (Baba Hadil bin Baba Zain with him) (Azam, Baba & Aqmar) for the second defendant.

Wong Kian Kheong J:

A. INTRODUCTION

[1] The first defendant company ('the first defendant') distributes 'Mazda' cars and has entered into a 'vehicles sales dealer agreement' ('dealership agreement') with the plaintiff company ('the plaintiff').

[2] The dealership agreement, among others, allows the plaintiff to sell Mazda cars.

[3] The second defendant company is a licensed bank ('bank') which has provided a 'floor stocking facility' to the plaintiff ('facility'). The repayment of the facilities by the plaintiff is secured by two debentures created by the plaintiff in favour of the bank ('debentures'). The debentures provide for, among others, floating charges to be created over all assets of the plaintiff ('floating charges').

B. ISSUES

[4] This originating summons ('OS') is an interpleader filed by the plaintiff and raises the following questions:

(a) whether the first defendant or the bank is entitled to 26 Mazda cars ('cars'):

(i) which have been sold by the first defendant to the plaintiff ('sale') but the plaintiff has not paid the first defendant for the sale; and

(ii) the bank has financed the sale by way of the facility.

To decide the above issue, it is necessary to ascertain who has property in the cars under ss 19 and 20 of the Sale of Goods Act 1957 ('the SGA'). In this regard:

(1) whether the dealership agreement has provided for a 'Romalpa Clause' (retention of title clause) which enables the first defendant to retain property in the cars until the first defendant is paid in full for the cars;

(2) has property in the cars passed from the first defendant to the plaintiff under ss 19(3) and 20 of the SGA?; and

(3) if property in the cars has passed from the first defendant to the plaintiff under ss 19(3) and 20 of the SGA:

(A) whether the first defendant is deemed to have notice of the floating charges when particulars of, among others, the floating charges have been registered with the Registrar of Companies ('ROC') under s 108(1) of the then applicable Companies Act 1965

('the CA (1965)'). This OS does not concern the Companies Act 2016 which comes into force on 31 January 2017; and
(B) whether the cars fall within the ambit of the floating charges notwithstanding the fact that the sale took place after the registration of the floating charges; and

(b) whether the court should exercise its discretion under O 17 r 8 of the Rules of Court 2012 ('the RC') to:

(i) deprive the plaintiff of costs of this interpleader; and

(ii) order the plaintiff to pay costs of the OS to both the first defendant and the bank because:

(1) the plaintiff has breached the dealership agreement and the facility agreement; and

(2) both the first defendant and the bank are innocent parties who have suffered loss due to the plaintiff's acts.

C. BACKGROUND

[5] On 10 February 2011 the plaintiff and first defendant entered into the dealership agreement. Consequently, the plaintiff sells Mazda cars in its showroom ('showroom'). The dealership agreement was renewed on 11 December 2015.

[6] The facility with a limit of RM1.5m was offered by way of a letter dated 2 May 2012 from the bank to the plaintiff. The plaintiff accepted the facility which stated, among others, as follows:

> Security:
>
> 1. *Debenture of RM1.5 million in a form of a floating charge over all the [Plaintiff's] stock of motor vehicles financed by the (Bank) under the account.* ... (Emphasis added.)

[7] To secure the plaintiff's repayment of the facilities, the plaintiff executed the first debenture in favour of the bank on 9 April 2013 ('first debenture'). Particulars of the first debenture, including the floating charge, had been registered with the ROC.

[8] The Facility was renewed by the bank's letters dated 8 April 2014, 25 March 2015 and 24 March 2016 to the plaintiff.

[9] Upon an application by the plaintiff, the bank increased the facility to a limit of RM3m by way of a letter dated 17 November 2016 ('increase in facility'). To secure the plaintiff's repayment of the increase in facility, the

plaintiff executed a supplementary debenture in favour of the bank on 29 December 2016 ('second debenture'). Particulars of the second debenture, including the floating charge, had been registered with the ROC.

[10] All the cars had been purchased by the plaintiff from the first defendant with funds from the facility but the first defendant had not been paid by the plaintiff for the cars.

[11] The bank's officer visited the showroom and found that none of the cars were at the showroom. The bank then wrote a letter dated 23 April 2018 to the plaintiff ('bank's letter dated 23 April 2018') which, among others:

(a) requested the plaintiff to inform the bank about the whereabouts of the cars on an urgent basis; and

(b) stated that the facility had been suspended because of the plaintiff's breach of the facility agreement.

[12] The plaintiff did not reply to the bank's letter dated 23 April 2018. Consequently, the bank lodged a police report on 8 May 2018 because the cars had been removed from the showroom without the bank's consent ('bank's police report').

[13] The bank had disbursed a total sum of RM2,963,254 to the plaintiff under the facility.

D. WHO HAS PROPERTY IN THE CARS?

[14] Sections 19 and 20 of the SGA provide as follows:

19 *Property passes when intended to pass*

(1) *Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*

(2) *For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.*

(3) *Unless a different intention appears the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.*

20 *Specific goods in a deliverable state*

Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the

goods, or both, is postponed. (Emphasis added.)

[15] The cars are 'goods' as defined in s 2 of the SGA as follows:

> *'goods' means every kind of movable property* other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; (Emphasis added.)

[16] The cars are 'specific goods' within the meaning of s 2 of the SGA because the cars have been 'identified and agreed upon at the time a contract of sale is made'.

[17] Section 2 of the SGA provides that goods are in a 'deliverable state' when they are 'in such state that the buyer would under the contract be bound to take delivery of them'.

[18] The term 'property' in s 19(1) and (3) of the SGA has been defined in s 2 of the SGA as the 'general property in goods, and not merely a special property'.

D(1). Whether dealership agreement provides for the first defendant to retain property in the cars until the first defendant has been paid for the cars

[19] According to s 19(1) of the SGA, when property in the cars is transferred from the first defendant to the plaintiff depends on the intention of the plaintiff and first defendant. To ascertain such an intention, s 19(2) of the SGA provides that 'regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case'.

[20] In this case, cl 11.1 of the dealership agreement provides that subject to cl 8.1 (which confers a right on the first defendant to vary the dealership agreement), the dealership agreement 'embodies the entire understanding of the parties and there are no prior promises, terms, conditions or obligations, oral or written, expressed or implied, other than those contained therein' ('entire agreement clause'). In *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585 at pp 593–594; [2005] 2 CLJ 596 at pp 607–608, Nik Hashim JCA (as he then was) decided in the Court of Appeal that the effect of an entire agreement clause in a contract is that the contract 'constitutes a binding agreement between [the parties] with regard to all matters mentioned in the contract and … the contract does not permit any term to be implied or import any other consideration not in the contract'. By virtue of the entire agreement clause, the court can only give effect to the dealership agreement without considering:

(a) the conduct of the first defendant and plaintiff; and

(b) the circumstances of this case.

[21] The effect of ss 19 and 20 of the SGA is explained in the following three cases:

(a) in *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70 at pp 81–82, Gopal Sri Ram JCA (as he then was) decided as follows in the Court of Appeal:

> In my judgment, that question falls to be resolved in accordance with the relevant provisions of [SGA] which in this instance are ss 19 and 20 ...
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> ...
>
> The effect of these sections may be summarised thus. In a contract for the sale for specific or ascertained goods, property in them passes from the seller to the buyer according to the intention of the parties. That intention is to be gathered from the terms of the contract, the conduct of the parties and all the circumstances of the case. In the absence of a contrary intention, property in specific goods passes to the buyer at the time the contract is made. And it matters not whether the parties have postponed either payment for, or the delivery of, the goods.
>
> It has been recognised by high authority that although the provisions of are merely rules that operate in the absence of a contrary intention, in practice, they are of much importance. That is because of the extreme difficulty in the great majority of cases to actually prove the intention of the parties. As Lord Wright said in *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at p 67 when speaking of the corresponding English provisions:
>
> > It is true that all these rules, both under s 18 and under s 19, are prima facie rules, and depend on intention, but the intention in this regard by the parties is seldom or never capable of proof. It is to be ascertained, as already stated here, by having regard to the terms of the contract, the conduct of the parties and the circumstances of the case.
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> There may, of course, be cases where the parties by words or conduct evince a clear intention that the property in specific goods is not to pass at the time the contract is made. In such a case, property in the goods will remain in the vendor until the event specified by the contract occurs. A case which illustrates this point is *Au Yong Kun Min v Tractors Malaysia Bhd* [1997] 5 MLJ 168. There the vendors of a tractor retained ownership of it after having parted with possession to the buyer. They also reserved unto themselves the right to take possession of the tractor if there was any default in payment of any of the sums due under the agreement in question. In an instructive judgment, Augustine Paul J, reviewed all the relevant case law on the point and held quite rightly that the rule governing intention housed in the English equipollent of s 20 had been displaced.
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> The present case is a far cry from *Au Yong Kun Min v Tractors Malaysia Bhd*.

Here, *Wing Teik* and *Sabah Shipyard* did not express any intention as to when property in the turbine (which comes within the category of 'specific goods') will pass from the one to the other. Neither is there any form of conduct or circumstances from which such intention is to be deduced. The rule expressed in s 20 of the Sale of Goods Act 1957 therefore applies with full force. Accordingly, the property in the turbine passed from Wing Teik to Sabah Shipyard when the contract was made. ... (Emphasis added.)

It is to be noted that there is no entire agreement clause in *BSNC Leasing*;

(b) in the Court of Appeal case of *Interdeals Automation (M) Sdn Bhd v Hong Hong Documents Sdn Bhd* [2015] 3 MLJcon 213; [2009] 2 CLJ 321 at paras [4], [6] and [9], Gopal Sri Ram JCA held as follows:

[4] *The first question that needs to be addressed is whether there was retention of title by the plaintiff. The answer to this question must be found from within the terms of the contract* ...

...

[6] *It is settled law that parties to a contract for the sale of goods may agree that the ownership in them would only be transferred from the vendor to the buyer when the latter has met all his or her obligations contained in the contract. See, Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552. *Such a term in a contract for the sale of goods (styled a 'Romalpa clause') has the effect of making the buyer a trustee or fiduciary of the goods for the seller thereby entitling the latter to trace them into the hands of third parties to whom the buyer may transfer them. Central to this proposition is the postulate that the Romalpa clause must be a term of the contract* ...

...

Once it is accepted, as I have, that the contract contained no Romalpa clause, no question of affording the plaintiff the right to retake possession of the machine arises. It is the general rule of construction housed in s 20 of the SGA that applies ...

[9] ... *It does not matter that the defendant was to pay the price in two stages. Property in the machine passed from the plaintiff to the defendant when the contract was made* ... (Emphasis added.); and

(c) in *Au Yong Kun Min v Tractors Malaysia Bhd* [1997] 5 MLJ 168 at pp 179–180 and 182; [1997] 5 CLJ 31 at pp 41–42 and 44, Augustine Paul JC (as he then was) gave the following judgment in the High Court:

Where a contract of sale is conditional there is no transfer of the property to the buyer till the conditions are satisfied. An unconditional sale is a sale pure and simple, transferring the property absolutely to the buyer. A conditional sale is a sale subject to some conditions ...

...

Under (s 20 of the SGA) the property in the goods passes to the buyer when the contract is made even if the time of payment of the price, or the time of delivery of the goods, or both, is postponed subject to fulfillment of the following conditions:

(d) *The contract of sale must be unconditional. With regard to the meaning of the phrase 'unconditional contract' Siti Norma Yaakob J (as she then was) said in Ng Nat Siang v Arab-Malaysian Finance Bhd & Anor* [1988] 3 MLJ 319 *at p 321*:

In Benjamin's Sale of Goods, unconditional contracts have been defined to mean 'not subject to any condition suspensive of the passing of the property'

(e) *The contract must relate to specific goods …*

(f) *The goods must be in a deliverable state …*

…

The right of the seller to retake possession of the goods can also be achieved by the insertion of a Romalpa clause in the contract following the decision of the Court of Appeal in Aluminium Industrie Vaassen BV v Romalpha Aluminium Ltd [1976] 1 WLR 676. (Emphasis added.)

[22] The following provisions of the dealership agreement are relevant:

2.1.1 *Supply of Vehicles*

As far as is possible to maintain regular supplies of the Vehicles to the Dealer who shall purchase the same from the Distributor such number of units of the Vehicles as shall be determined from time to time Provided Always That the Distributor shall in no way be responsible for any delay in supplying the Vehicles due to strikes, lock-outs, plant/machinery breakdowns, governmental restrictions, delay in shipments by the Distributor's principal or any cause beyond the Distributor's control.

2.1.2 *Purchase Price of Vehicles*

To fix from time to time the prices of the Vehicles payable by the Dealer to the Distributor, which price shall take immediate effect and be binding as at the time that they are notified to the Dealer and the Dealer shall not be entitled to claim for any rebate or compensation or reduction of price or prices so fixed by the Distributor.

…

3.1 *The Dealer hereby agrees with the Distributor as follows:-*

3.1.1 *Sales at Standard Pricing*

To sell the Vehicles only at the approved standard price issued by the Distributor to the Dealer in the manner as provided in Clause 2.1.3 hereto. The Dealer further agrees, covenants and/or undertakes with the Distributor that the Dealer shall not offer any discounts in respect of the Vehicles unless the Dealer shall have obtained the Distributor's prior written approval.

…

3.1.4 *Delivery of Vehicles*

Upon such payment having been made by the Dealer to the Distributor, the Dealer shall take delivery of the Vehicles immediately from such location of the Distributor as the Distributor may designate and in accordance with the Distributor's procedural guidelines. All costs and expenses relating to the taking of delivery of the Vehicles by the Dealer, including insurance coverage, transport and the procurement of trade plates, shall be solely borne by the Dealer.

3.1.5 *Failure in Payment*

In the event of failure of the Dealer to make payment to the Distributor within three (3) working days of the appointed time and date fixed for delivery in accordance with Clause 3.1.4 above of the stocks of the Vehicles allocated to the Dealer, the Distributor shall be at liberty to deal with such Vehicles as it thinks fit without any liability to the Distributor. (Emphasis added.)

[23] Firstly, the dealership agreement is a commercial contract and should be interpreted in a commercially sensible manner — please see the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at para [10].

[24] I have perused the dealership agreement, in particular the clauses stated in the above para 22. Construing the dealership agreement in a commercially sensible manner, the dealership agreement does not provide, either expressly or by necessary implication, that the first defendant shall retain property in the cars until and unless the first defendant is paid in full for the cars by the plaintiff. In other words, the dealership agreement does not have a Romalpa Clause which vests ownership of the cars in the first defendant until the plaintiff has paid in full for the cars.

D(2). Effect of ss 19(3) and 20 of the SGA

[25] I am of the view that ss 19(3) and 20 of the SGA (as explained in the trilogy of cases cited in the above para 21) apply to the sale as follows:

(a) the dealership agreement is an 'unconditional contract' for the sale of the cars by the first defendant to the plaintiff in the sense that property in the cars has not been retained by the first defendant — please see the above paras 22–24;

(b) the cars are 'specific goods' within the meaning in s 2 of the SGA; and

(c) the cars are in a 'deliverable state' as defined in s 2 of the SGA.

As the three conditions stipulated in s 20 of the SGA have been fulfilled in this case, 'property' (as understood in s 2 of the SGA) in the cars would pass to the

plaintiff 'when the contract is made'. Hence, the property in the cars has passed from the first defendant to the plaintiff by virtue of ss 19(3) and 20 of the SGA.

E. THE FIRST DEFENDANT IS DEEMED TO HAVE NOTICE OF FLOATING CHARGES

[26] Upon registration of the floating charges with the ROC, the following cases have decided that the public, including the first defendant, is deemed to have notice of the floating charges:

(a) in the Court of Appeal case of *Tan See King & Anor v Anata Knitting Industry (M) Sdn Bhd* [2013] 2 MLJ 284 at p 288, Anantham Kasinather JCA decided as follows:

> *On the particular facts of this case, we are satisfied that this registration of the earlier debentures with the Companies Commission sufficed to serve as sufficient notice of the existence of the fixed charge in favour of the respondent.* (Emphasis added.)

(b) in the High Court case of *Malaysian International Merchant Bankers Bhd v Highland Chocolate and Confectionary Sdn Bhd & Anor (No 2)* [1998] 4 CLJ Supp 32 at p 46, Abdul Malik Ishak J (as he then was) held as follows:

> *As I said the debenture dated 23 October 1993 was duly registered with the registrar of companies. There was no reason as to why the second defendant should not have notice about the charge under the Companies Act 1965 in favour of the plaintiff.*
>
> *There was no evidence emanating from the second defendant to show that they had made a search with the registrar of companies. On perusal of encl 17, para 3(c) thereof, it can safely be inferred that at all material times the second defendant knew that the holder of the prior registered charge was Bank Bumiputra Malaysia Berhad ('BBMB').* ... (Emphasis added.)

(c) Nallini Pathmanathan J (as she then was) decided as follows in the High Court in *CIMB Bank Bhd v ZAQ Construction Sdn Bhd* [2013] 1 LNS 230 at para [44]:

> 44. ... *The effect of registration under section 108 of the Companies Act 1965 is to notify the world at large of the existence of the Plaintiff's security in the assets of Asia Petroleum.* (Emphasis added.); and

(d) it is decided in *NGV Tech Sdn Bhd (receiver and manager appointed) (in liquidation) v Ramsstech Ltd* [2015] MLJU 671 at para [166], as follows:

> 166. *Section 11(2)(a) (of the CA (1965)) allows any person, including the Defendants, on payment of prescribed fee, to inspect any document lodged with SSM. Under s 11(2)(c) (of the CA (1965)), any person may request for a copy or extract of any document which he or she is entitled to inspect under s 11(2)(a) (of*

the CA (1965)), to be given and certified by the ROC. Accordingly, the Defendants could have easily conducted a SSM search of the Ship Builder and consequently, could have obtained a copy of Form 34 of the 6 Debentures. (Emphasis added.)

The decision in *NGV Tech* has been affirmed by the Court of Appeal.

F. WHETHER THE CARS FALL WITHIN AMBIT OF FLOATING CHARGES

[27] It is not disputed that when a company creates a debenture over the company's assets, the debenture holder is a secured creditor of the company — please see the Court of Appeal's judgment delivered by Azhar Ma'ah JCA in *AIMB Marketing Sdn Bhd & Ors v Malaysian Trustees Bhd & Ors* [2011] 5 MLJ 210 at p 214.

[28] Section 4(1) of the CA (1965) defines a 'debenture' to include 'debenture stock, bonds, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not'.

[29] In *NGV Tech* at para [73], I have referred to the description of a fixed charge and a floating charge given by Lord MacNaghten in the House of Lords in *Illingworth v Houldsworth & Anor* [1904] AC 355 at p 358 as follows:

> I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. *A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp*. (Emphasis added.)

[30] Regarding the construction of debentures, I have following Singapore cases in *NGV Tech* at paras [74]–[75] as follows:

> 74. *I derive assistance from the following 2 Singapore cases on how to construe a debenture*:
>
> (a) *Chao Hick Tin JC (as his Lordship then was) decided as follows in Re Lin Securities Pte Ltd*, at pp 140, 141, 142, 143 and 144:
>
> *No particular form of words is necessary for the purpose of creating a charge. Any written instrument showing the intention of the parties that a security should be thereby created would suffice although it contains no general words of a charge: see Fisher & Lightwood on Law of Mortgages (9th Ed) at p 13 ...*
>
> The next question for determination, which is the key question, is whether the charge created is a fixed charge or a floating charge.

Generally, a charge on all the property, both present and future, will create a floating charge. So will a charge upon all the property now belonging or hereafter acquired by the company (see Palmer on Company Law Vol I, 23rd Ed Paragraph 44-06). A charge over stock in trade and book debts is normally a floating charge. But there is no magic in any particular set of words. A floating charge may be created without resort to such classical words and expressions as 'present or future property' or 'undertaking'.

...

It is clear that whether an instrument creates a fixed or a floating charge does not necessarily depend on the label given to it or a particular set of words used by the parties ...

In construing the LOH (Letter of Hypothecation), I am mindful of the fact that the court is not entitled to rely upon anything which any party subsequently did or said ...

Counsel for the liquidators has quite rightly conceded to the submission made by Mr Lloyd (learned Queen's Counsel for the 6th and 16th defendants) that subsequent conduct of the parties should not be relied upon to construe the LOH. But, as the authorities indicated, surrounding circumstances would be relevant and could be taken into account ...

Accordingly subjective evidence of the intention of the parties is not admissible, but the court can properly have regard to what has been called the matrix of fact, ie the extrinsic circumstances surrounding the transaction including the conduct of the parties at the time the contract was entered into.

...

It seems to me that one should not determine the effect of the LOH wholly within the four corners of the document. It must be viewed in the context of the surrounding circumstances of the transaction. First was of course the business of the company itself, the stockbroking business. I think this court is quite entitled to take judicial notice of what this line of business involved and how such business was transacted, ie the buying and selling of shares on behalf of clients. (Emphasis added.); and

(b) in *Re EG Tan & Co Pte Ltd; Wong Tui San & Ors v Chase Manhattan Bank NA* [1991] 3 MLJ 301 at p 305, Lai Kew Chai J held as follows in the Singapore High Court:

The first question is simply but most importantly in this case one of construction of the share memorandum as to the intention of the parties in relation to the respondents' security in the shares deposited and to be deposited on and as from 26 August 1982. This task has to be undertaken by first and foremost ascertaining the ordinary meaning of the words used in the share memorandum against the 'factual matrix' or background of the transactions and eschewing in the process of construction matters dehors the share memorandum such as the subjective wishes or intent of either party before the agreement was signed or their subsequent conduct: see *Re Lin Securities Pte Ltd* [1988] 2 MLJ 137 at pp 137 and 143E–144G. (Emphasis added.)

75. I am of the view that despite:

(a) the definitions of 'debenture' in s 4(1) CA and s 2(1) CMSA;

(b) the meaning of 'charge' given in s 4(1) CA; and

(c) previous cases which have explained the meaning of a 'debenture', 'charge', 'fixed charge' and 'floating charge'

— the meaning and effect of a 'charge', 'fixed charge' and 'floating charge' as provided in a particular 'debenture', is a question of construction of the debenture in question. Based on Re Lin Securities Pte Ltd and Re EG Tan & Co Pte Ltd, the interpretation of a debenture —

(i) *depends on the ordinary meaning of the actual words used in the debenture. The label given by the parties may not be conclusive; and*

(ii) *the factual matrix at the time of the creation of the debenture, namely the extrinsic surrounding circumstances regarding the execution of the debenture, may be considered in construing the debenture. The factual matrix concerning the creation of the debenture includes —*

(iia) *the conduct of parties at the time of the creation of the debenture; and*

(iib) *the nature and scope of business conducted by the parties at the time of the execution of the debenture*.

The construction of the debenture cannot take into account the following matters —

(1) *the parties' subjective intention; and*

(2) *the statement and conduct of the parties after the execution of the debenture.* (Emphasis added.)

[31] The following clauses in the first debenture are relevant in this case:

SECTION 2.01 *DEFINITIONS*

'Charged Assets' means all the Borrower's stock of motor vehicles financed by the Financier, both present and future including but not limited to the said vehicles rights title interest that may now or hereafter be charged or otherwise secured in favour of the Financier by and under or pursuant to this Debenture and the proceeds of the security constituted by or pursuant to this Debenture and reference to the 'Charged Assets' includes reference to each and every part thereof;

...

SECTION 5.01 *FLOATING CHARGE*

As a continuing security for the discharge of all obligations and liabilities and the payment of all principal moneys interest and all other charges costs and expenses owing and incurred by the Borrower to the Financier in connection with the Facility and/or under this Debenture, the Borrower as beneficial owner hereby charges to the Financier by way of a first floating charge on all the Charged Assets of whatever description now or hereafter belonging to the Borrower financed by the Financier under the Facility including the Motor Vehicles referred to in Section 3.01 hereof …

SECTION 5.05 *CONTINUING SECURITY*

> *The security herein created is expressly agreed and declared by the Borrower to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Financier by the Borrower …* (Emphasis added.)

[32] The second debenture has the same provisions as the definition of 'Charged Assets' and section 5.05 of the first debenture. Section 5.01 of the second debenture is substantially similar to section 5.01 of the first debenture.

[33] Based on cases regarding the interpretation of debentures as explained in the above para 30, I am of the following view:

(a) the plaintiff owns the property in the cars (please see the above Parts D(1) and D(2)). The cars (owned by the plaintiff) would fall within the wide definition of 'Charged Assets' in the debentures; and

(b) the cars were acquired by the plaintiff after the execution and registration of the floating charges with the ROC. Nonetheless, the cars would form part of the charged assets which 'hereafter' belonged to the plaintiff under section 5.01 of the debentures. Furthermore, the floating charges are a 'continuing security' pursuant to section 5.05 of the debentures and would include the cars which had been purchased by the plaintiff after the execution and registration of the floating charges with ROC.

[34] As the cars fall within the wide purview of the floating charges, the bank (not the first defendant) is entitled to the cars.

G. BANK IS NOT BOUND BY DEALERSHIP AGREEMENT

[35] The bank is not a party to the dealership agreement. Based on the doctrine of privity of contract, the bank is not bound by the dealership agreement — please see the Privy Council's decision delivered by Lord Wilberforce in *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 at p 174 (an appeal from Malaysia).

H. COSTS

[36] Order 17 r 8 of the RC provides as follows:

> *Subject to the foregoing rules of this Order, the Court may in or for the purposes of any interpleader proceedings make such order as to costs or any other matter as it thinks just.* (Emphasis added.)

[37] In *Peter Yip Shou Shan v George Kent (M) Bhd & Ors* [2002] 2 MLJ 146 at p 150; [2002] 2 CLJ 205 Abdul Aziz Mohamad J (as he then was) decided as follows in the High Court:

It is said at p 168 of Mallal's Supreme Court Practice (2nd Ed, Vol 1, 1983) that 'Where a person holds any money, goods or chattels which he does not claim or is under liability for a debt and he expects to be sued in respect of that money, goods or chattels by two or more persons, that person can protect himself from an action and the costs of such an action by calling on these claimants to interplead, in other words, to claim against one another, so that the court can decide to whom the money, goods or chattels belong …'. That being the nature of the relief by way of interpleader, an applicant for relief, in a proper application, should, in principle, not be liable to pay costs but should instead be paid his costs by either of the claimants, because it is their conflicting claims that have compelled him to seek the relief. The claimant liable to pay the costs of the applicant should be the claimant who fails in the claim, who should also bear the costs of the successful claimant.

In this case, as I said earlier, if the senior assistant registrar had found the application not to have been properly brought, the proper order should have been to dismiss it and to make the applicant pay costs. It is only when the application is dismissed that the applicant should be liable to pay costs. (Emphasis added.)

[38] I am of the following view regarding the court's power under O 17 r 8 of the RC to award costs for interpleader proceedings:

(a) the court has a wide discretion to award costs pursuant to O 17 r 8 of the RC as is clear from the words 'as it thinks just' in that provision;

(b) cases regarding costs under O 17 r 8 of the RC, as for all other cases on costs, are premised on the exercise of the court's discretion. The exercise of such a judicial discretion is dependent on the particular facts of the case at hand. Hence, previous cases on costs cannot constitute binding legal precedents from the view point of the doctrine of stare decisis;

(c) if an interpleader is rightly commenced, *generally*, the court may order costs of the interpleader proceedings to be paid by an unsuccessful claimant to:

  (i) the party who commences the interpleader proceedings; and

  (ii) the successful claimant; and

(d) even if an interpleader is rightly filed, *exceptionally*, the court may deprive the party who files the interpleader of costs of the interpleader proceedings and may even order the interpleader to pay such costs to all the claimants. This case demonstrates one of the exceptions.

[39] In the present case, despite the fact that this interpleader is rightly commenced by the plaintiff, I exercise my discretion under O 17 r 8 of the RC to order the plaintiff to pay costs of this OS to both the first defendant and the bank. This exercise of discretion is based on the following exceptional circumstances:

A (a) the plaintiff had breached the dealership agreement by not paying the first defendant for the sale of the cars;

(b) the plaintiff had not only defaulted on the facility but had also removed the cars from the showroom without the bank's consent. The plaintiff did not even have the candour to reply to the bank's letter dated 23 April 2018. Lastly, the bank's police report had been lodged against the plaintiff;

B

(c) the first defendant and the bank are blameless in this case; and

C (d) the plaintiff's above breaches had caused loss to the first defendant and the bank.

I. SUMMARY OF COURT'S DECISION

D **[40]** In brief:

(a) a commercially sensible construction of the dealership agreement does not show that the dealership agreement has a Romalpa Clause wherein the first defendant retains property in the cars until and unless the first defendant is paid in full for the cars by the plaintiff;

E

(b) pursuant to ss 19(3) and 20 of the SGA, the property in the cars has been transferred from the first defendant to the plaintiff when the sale contract is made;

(c) the first defendant is deemed to have notice of the floating charges which F have been registered with ROC;

(d) the bank is entitled to the cars because the cars fall within the wide ambit of the floating charges; and

(e) the court exercises its discretion under O 17 r 8 of the RC to order the G plaintiff to pay costs of this OS to both the first defendant and the bank due to the exceptional circumstances of this case.

Order accordingly.

H Reported by Nabilah Syahida Abdullah Salleh

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